

1-6.000

**DEPARTMENT OF JUSTICE
PERSONNEL AS WITNESSES**

- 1-6.100 Introduction**
- 1-6.111 Definitions -- "Employee"**
- 1-6.112 "Originating Component"**
- 1-6.113 "Motion to Quash"**
- 1-6.120 Inapplicability of 28 C.F.R., Section 16.21 et seq. in Certain Cases**
- 1-6.200 Procedure Where United States is Not a Party**
- 1-6.210 Notification on Receipt of Request**
- 1-6.220 Required Affidavit for Oral Testimony**
- 1-6.230 Consultation With the Originating Component**
- 1-6.240 Authorizing Disclosure in General**
- 1-6.250 Procedure if the United States Attorney and the Originating Component Both Desire Disclosure**
- 1-6.260 Procedure if the United States Attorney and the Originating Component Either Disagree on Disclosure or Agree That No Disclosure Should be Made**
- 1-6.261 Where Information Was Collected in Connection With a Matter Supervised by a Litigating Division**
- 1-6.262 Where Information Was Collected in Connection With a Matter Not Supervised by a Litigating Division**
- 1-6.270 Denial Policy -- United States Not a Party**
- 1-6.300 Procedure Where United States is a Party**
- 1-6.310 Notification on Receipt of Request**
- 1-6.320 Required Affidavit for Oral Testimony**
- 1-6.330 Consultation With the Originating Component**
- 1-6.340 Authorizing Disclosure in General**
- 1-6.350 Procedure if the Department Attorney in Charge of a Case and the Originating Component Both Agree on Disclosure**
- 1-6.360 Procedure if the Department Attorney in Charge of a Case and the Originating Component Either Disagree on Disclosure or Agree that the Demand Should be Denied**
- 1-6.370 Procedure if on a Referral the Material Demanded Arose in a Case Supervised by a Division Other Than the Division Receiving the Referral**
- 1-6.380 Denial Policy -- United States a Party**
- 1-6.400 Denial Policy in General**
- 1-6.420 Presence of Factors Set Forth in 28 C.F.R. Sec. 16.26(a), (b)**
- 1-6.440 Decision by the Deputy Attorney General or the Associate Attorney General**

- 1-6.500 Procedure in the Event a Departmental Decision Has Not Been Made at the Time a Response is Required**
 - 1-6.520 Procedure in the Case of a Denial**
 - 1-6.530 Responding to a Contempt Citation for Failure to Respond to a Demand**
 - 1-6.600 Special Drug Enforcement Authorization**
 - 1-6.620 Reimbursement of Travel Expenses**
 - 1-6.630 Official Leave**
 - 1-6.640 Witness Fees**
-

1-6.100 Introduction

Subpart B of Part 16 of Title 28, Code of Federal Regulations, was amended by Attorney General Order No. 919-80, effective December 4, 1980, published at 45 Fed. Reg. 83,210 (1980). These regulations provide that no present or former employee of the Department of Justice may testify or produce Departmental records in response to subpoenas or demands of courts or other authorities issued in any state or federal proceeding without obtaining prior approval by an appropriate Department official. Information regulated by 28 C.F.R. 16.21 et seq., falls into the following categories:

- A. Any material contained in the files of the Department;
- B. Any information relating to material contained in the files of the Department; or
- C. Any information acquired by an employee of the Department as a part of the performance of that employee's official duties or because of the employee's official status.

The 1980 amendments to the regulations both decentralize the authorization power and establish different procedures to be followed in cases in which the United States is and those cases in which the United States is not a party. Additionally, alternate procedural steps are sometimes involved where the "originating component" is or is not a litigating division of the Department. A denial policy generally applicable to both situations exists.

As will be noted in Section 1-6.400, the regulations are not intended to create new privileges or to supersede existing discovery rules. They simply are intended to provide a procedure whereby the Department will have the opportunity to protect certain types of information from unwarranted and unconsidered disclosure. Specific questions should be referred to the appropriate litigating division of the Department.

1-6.111 Definitions -- "Employee"

The term "employee" is defined to include "all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including United States Attorneys, U.S. Marshals, U.S. Trustees and members of the staffs of those officials." 28 C.F.R. 16.21(b). A state or local law enforcement officer assigned to a joint task force or other working group is included within this definition to the extent the subpoena or demand relates to his or her work on the task force. However, if authorization is sought for testimony by a federal employee employed by an agency other than the Department of Justice, Department policy requires that such authorization be obtained from the employing agency even if the employee is a member of a joint team such as an Organized Crime Strike Force. Also included in the definition are former Department employees in cases in which the subpoena or demand seeks testimony as to information acquired while the person was employed by the Department.

1-6.112 "Originating Component"

The term "originating component" means the bureau, division, office, or agency of the Department that was responsible for the collection, assembly, or other preparation of the materials demanded, or that, at the time the person whose testimony was demanded acquired the information in question, employed such person. 28 C.F.R. 16.24(a). See the DOJ Organizations and Functions Manual at 19 and 22 for examples of the concept of "originating component."

1-6.113 "Motion to Quash"

The term "motion to quash" includes a motion for a protective order and appropriate objections to testimony.

1-6.120 Inapplicability of 28 C.F.R., Section 16.21 et seq. in Certain Cases

The regulations are limited in their scope to subpoenas and demands issued for the testimony of Department of Justice employees or records only. The regulations do not apply to subpoenas received by an official of another government agency or to requests for that agency's documents, even if the Department of Justice is representing the agency in the litigation. Employees of another federal agency should be advised to contact the General Counsel's Office of their agency for appropriate instructions if they receive a subpoena.

In those cases in which a Department of Justice employee is required to testify in a matter unrelated to his/her official duties or to disclose information not contained in the Department's files nor acquired as part of his/her official duties, the regulations do not apply. For illustrative examples, see the DOJ Organizations and Functions Manual at 18.

1-6.200 Procedure Where United States is Not a Party

Sections 1-6.210 through 1-6.270 describe procedures to be followed when the United States is not a party.

1-6.210 Notification on Receipt of Request

Requests for authorization pursuant to the regulations are initiated when an employee of the Department informs the United States Attorney for the district in which the issuing authority for the demand is located of receipt of the demand. 28 C.F.R. 16.22(b). All employees are directed to notify the appropriate USAO immediately upon receipt of the subpoena or other demand. Unless the United States Attorney is made aware of the demand, the procedures prescribed in the regulations cannot be put into effect; thus, it is urgent that each USAO be notified promptly by the employee receiving the demand and that each USAO establish procedures to receive such notification and to take the appropriate steps under the regulations.

1-6.220 Required Affidavit for Oral Testimony

Section 16.22(c) requires that the party making a demand for oral testimony must provide the United States Attorney with an affidavit, or, if that is not feasible, with a statement setting forth a summary of the oral testimony sought by the demand and its relevance to the proceedings. If authorization for oral testimony is subsequently granted, it must be limited to the scope of the demand as summarized in such affidavit or statement. Section 16.22(d) imposes similar summary and relevancy requirements when information other than oral testimony is sought. It should be noted that the authorization granted by the appropriate Department official for testimony is to be limited to the scope of the demand as summarized, although the recommended practice is to

limit authorization for release of information other than oral testimony to the demanding party's request, as well, absent some special circumstances.

It should also be noted that a motion to quash based on applicable privileges and rules of evidence on relevancy is often appropriate. In such cases the United States Attorney or his/her designated assistant should take that action as soon as practicable. 28 C.F.R. 16.24(c).

In addition, negotiation with the party making the demand is, in many cases, quite appropriate. Often the issues can be narrowed so that authorization is possible or the demand may be withdrawn once the government's relevant concerns and supporting arguments are raised and discussed. Quite often a potentially lengthy litigative battle can be resolved without excess time or cost through negotiations; such negotiations are actively encouraged by the Department. 28 C.F.R. 16.24(c).

It has been held that it is not error for a court to refuse to order a United States Attorney to testify when the Department's regulations have been cited as to lack of authorization under circumstances in which the moving party has failed to submit the affidavit or statement summarizing the testimony desired so that the Department could consider the request and determine whether to grant permission for the testimony. *United States v. Allen*, 554 F.2d 398 (10th Cir. 1977), *cert. denied*, 434 U.S. 836 (1977).

1-6.230 Consultation With the Originating Component

After the United States Attorney has clarified the scope of the demand he/she must notify the official in charge of the bureau, division, office, or agency of the Department that was responsible for the collection, assembly, or other preparation of the material demanded or that, at the time the person whose testimony is demanded acquired the information in question, employed such person. These units are collectively referred to as the "originating component." 28 C.F.R. 16.24(a). For illustrative examples, see the DOJ Organizations and Functions Manual at 19.

1-6.240 Authorizing Disclosure in General

In cases in which the United States is not a party, the power to authorize the disclosure is initially vested in the United States Attorney for the district in which the demand originated. 28 C.F.R. 16.22. As a general policy, the Department favors cooperation in state and federal cases in which the testimony of one of its employees is sought or in which information obtained by the Department is sought. Authorization in one form or another is usually granted if it is appropriate under the rules of procedure governing the case or matter in which the demand arose, and if it is appropriate under the relevant substantive law concerning privilege. *See* 28 C.F.R. 16.26(a) *and* USAM 1-6.420. A denial is not usually approved unless one of the factors set forth in 28 C.F.R. 16.26(b) is present. These factors include such things as that the disclosure will cause a violation of a statute or regulation or the revelation of a confidential source, classified information, trade secrets, the existence of a criminal investigation, or investigative techniques. *See* USAM 1-6.430.

1-6.250 Procedure if the United States Attorney and the Originating Component Both Desire Disclosure

In cases in which the United States is not a party, the United States Attorney for the district in which the issuing authority for the demand is located may authorize disclosure if the originating component does not object and if disclosure is both appropriate under the rules of procedure and the law of privilege. 28 C.F.R. 16.26(a), and will not involve any of the provisions of 28 C.F.R. 16.26(b) on factors that justify a denial. 28 C.F.R. 16.24(b). For an illustrative example, see the DOJ Organizations and Functions Manual at 20.

1-6.260 Procedure if the United States Attorney and the Originating Component Either Disagree on Disclosure or Agree That No Disclosure Should be Made

These cases are discussed in sections 1-6.261 and 1-6.262 below.

1-6.261 Where Information Was Collected in Connection With a Matter Supervised by a Litigating Division

If the United States Attorney and the originating component either disagree about the appropriateness of the disclosure or they agree that no disclosure should be made, they should then determine if the demand involves information that was collected, assembled, or prepared in connection with litigation or an investigation that is supervised by a division of the Department. If so, the United States Attorney must notify the Assistant Attorney General in charge of the division responsible for such litigation or investigation.

The AAG may:

- A. Authorize disclosure;
- B. Request the filing by the United States Attorney of a motion to quash the demand, if that has not already been done; or
- C. Upon denial of a motion to quash, or where such motion is inappropriate, refer the matter to the Deputy Attorney General or the Associate Attorney General for final resolution. 28 C.F.R. 16.24(d)(1).

For an illustrative example, see the DOJ Organizations and Functions Manual at 21. It should again be noted that the filing of a motion to quash, if suitable grounds exist, is the obvious step to take at the start of the process. The United States Attorney is always authorized to take this step and is expected to do so and argue the motion vigorously whenever it is appropriate to file such a motion.

1-6.262 Where Information Was Collected in Connection With a Matter Not Supervised by a Litigating Division

If the demand does not involve information collected in connection with an investigation or litigation under the supervision of a division of the Department, and there is a disagreement between the United States Attorney and the originating component on disclosure, the originating component has the authority to decide whether the disclosure is appropriate, except that, when an especially significant issue is raised, the United States Attorney may refer the matter to the Deputy Attorney General for higher level review. 28 C.F.R. 16.24(d)(2). The term "especially significant issue" is not defined in the regulations. It would seem that the raising by either side of a factor set forth in 28 C.F.R. 16.26(b) would qualify as an "especially significant issue." In addition, as a matter of comity, each of the two parties should give due deference to the views of the other in determining whether to seek higher level review. For an illustrative example, see the DOJ Organizations and Functions Manual at 22.

1-6.270 Denial Policy -- United States Not a Party

See USAM 1-6.400 for a full discussion. Note here that denials may be authorized only by the Deputy Attorney General or the Associate Attorney General, depending upon which official supervises the component referring the demand.

1-6.300 Procedure Where United States is a Party

Sections 1-6.310 through 1-6.370 describe procedures to be followed when the United States is not a party.

1-6.310 Notification on Receipt of Request

In cases in which the United States is a party, any employee of the Department receiving a subpoena is to immediately notify the attorney for the Department of Justice in charge of the case or matter. Occasionally information indicating the identity of such attorney will appear in the subpoena or demand that is served on the employee. In other cases, that information can be obtained by contacting the USAO for the district in which the demand arises or by contacting the appropriate division of the Department. It is essential that the specific attorney in charge of the case or matter be located and notified as soon as possible, as it is this attorney who is responsible for taking the appropriate actions under the regulations and who has the power to authorize testimony of the production of records in cases in which he/she deems such procedure to be appropriate.

1-6.320 Required Affidavit for Oral Testimony

In all cases in which a Department of Justice employee informs the appropriate Departmental trial attorney that he/she has been served with a demand for oral testimony, that attorney must clarify the demand by getting, where possible, an affidavit or, if that is not feasible, a statement setting forth a summary of the testimony or other information sought from the party making the demand. 28 C.F.R. 16.23(c). Note that unlike the situation in which the United States is not a party, in cases in which the United States is a party and the demand is for information other than oral testimony, no request may be required of the demanding party for a summary of the information sought or its relevance to the proceeding. The statements in USAM 1-6.220 on the use of appropriate motions to quash and the efficacy of negotiations to narrow a demand in cases in which the United States is not a party, are generally applicable as well to cases in which the United States is a party, bearing in mind the special considerations that are necessary in dealing directly with a litigative adversary. 28 C.F.R. 16.24(c). See also the discussion of *United States v. Allen* in USAM 1-6.220.

1-6.330 Consultation With the Originating Component

After the attorney in charge of the case or matter has clarified the scope of a demand for oral testimony, or in the case of a demand for non-oral testimony upon receipt of the notice of the demand, the attorney for the government must notify the official in charge of the originating component and consult with that component on the question of complying with the demand. See 28 C.F.R. 16.24(a). Consultation in this context requires obtaining the views of the originating component, especially in the presence or absence of the factors set forth in 28 C.F.R. 16.26.

1-6.340 Authorizing Disclosure in General

Section 16.23, 28 C.F.R. provides that every attorney in the Department of Justice in charge of any case or matter in which the United States is a party is authorized, after consultation with the originating component, to disclose relevant unclassified material deemed necessary or desirable to the discharge of that attorney's official duties, provided the disclosure is appropriate under the rules of procedure and the law of privilege (28 C.F.R. 16.26(a)), and further provided that disclosure would not violate statutes or regulations, or reveal confidential sources, classified information, trade secrets, ongoing investigations, or investigatory techniques. 28 C.F.R. 16.26(b). For illustrative examples, see the DOJ Organizations and Functions Manual at 23.

When, in the attorney's judgment, any of the factors set forth in Section 16.26(b) exist which preclude testimony or disclosure, no testimony or disclosure may be made without the express prior approval of the Assistant Attorney General in charge of the division responsible for supervising the case or matter or such

person's designee. 28 C.F.R. 16.23(a). An attorney in charge of a case or matter in which the United States is a party may also, at any time, request that the supervisory Assistant Attorney General review his/her decision on complying with a demand. 28 C.F.R. 16.23(b).

1-6.350 Procedure if the Department Attorney in Charge of a Case and the Originating Component Both Agree on Disclosure

If, after consultation, the originating component does not object to disclosure and the attorney in charge of the case or matter determines that disclosure is appropriate under 28 C.F.R. 16.26(a) and not barred by any factor set forth in 28 C.F.R. 16.26(b), the attorney is empowered to authorize the disclosure without seeking any further approval. 28 C.F.R. 16.24(b).

1-6.360 Procedure if the Department Attorney in Charge of a Case and the Originating Component Either Disagree on Disclosure or Agree that the Demand Should be Denied

There are three possible situations that can arise after consultation when there is disagreement on release or agreement on the appropriateness of a denial.

A. If the attorney in charge of the case believes that denial is appropriate because of the factors set forth in 28 C.F.R. 16.26, but the originating component believes that disclosure is appropriate, the regulations provide for higher level review. This requires that the attorney in charge of the case refer the demand to the Assistant Attorney General in charge of the division responsible for the case or matter being litigated. *See* 28 C.F.R. 16.23(a). The options open to that division on referral will be discussed later in this section.

B. If the attorney for the government believes that disclosure is appropriate under the factors set forth in 28 C.F.R. 16.26, but, after consultation, the originating component takes the position that disclosure should not take place, a sensitive decision has to be made by the attorney in charge of the case. Clearly, under the regulations, 28 C.F.R. 16.23, he/she can authorize disclosure despite the views of the originating component and without higher level review. He/she can also refer the matter for higher level review and decision by the division that supervises the case or matter in litigation. *See* 28 C.F.R. 16.23(b). The decision will depend on many factors, a number of which may well be unique to the individual case. As a rule of thumb, attorneys ought to give some deference to the views of the originating component, especially if that component's decision is based on its belief that a factor set forth in 28 C.F.R. 16.26(b) is present. The attorney is also encouraged to seek guidance in such cases from his/her immediate supervisor. There are no hard and fast rules, and the attorney, as noted, does retain ultimate authority under the regulations to authorize disclosure despite the originating component's objections. It should also be noted that pursuant to 28 C.F.R. 16.26(d), the Assistant Attorney General in charge of each division is free to issue any instructions or to adopt any supervisory practices consistent with regulations that would help foster consistent application of the standards promulgated and the other requirements of the regulations. In the context of this type of disagreement, care should be taken before overruling an originating component that the division in question has not issued a contrary instruction in its supervisory capacity.

C. If both the attorney in charge of the case or matter and the component agree that a denial is appropriate, the matter is to be referred to the Assistant Attorney General in charge of the division that supervises the case or matter in litigation. *See* 28 C.F.R. 16.23(a).

Once a demand has been referred for higher level review, the Assistant Attorney General in charge of the division may then take the same actions as can be taken in cases in which the United States is not a party, i.e.:

A. Authorize disclosure based on the factors in 28 C.F.R. 16.26;

- B. Authorize the attorney in charge of the case to file a motion to quash the demand if that has not already been done; or
- C. Upon denial of a motion to quash, or where such motion is inappropriate, refer the matter to the Deputy Attorney General or Associate Attorney General for final resolution. 28 C.F.R. 16.24(e).

1-6.370 Procedure if on a Referral the Material Demanded Arose in a Case Supervised by a Division Other Than the Division Receiving the Referral

Once a case or matter is referred for higher level review, a problem can arise if the demanded disclosure involves information originally collected, assembled, or prepared in connection with litigation or an investigation supervised by a unit of the Department other than the one which supervises the case or matter in litigation, and to which the matter has been referred. The division receiving the referral must notify the other division concerning the demand and the anticipated response. If the two litigating units of the Department are unable to resolve a disagreement concerning disclosure, the Assistant Attorneys General in charge of the two divisions in disagreement may refer the matter to either the Deputy Attorney General or the Associate Attorney General for decision, depending upon who supervises the originating component or, in the case of an independent agency that, for administrative purposes, is within the Department, to the Deputy Attorney General. 28 C.F.R. 16.24(e). For an illustrative example, see the DOJ Organizations and Functions Manual at 24.

1-6.380 Denial Policy -- United States a Party

See USAM 1-6.400 for a full discussion. Note here that denials may be authorized only by the Deputy Attorney General or the Associate Attorney General depending upon which official supervises the component referring the demand.

1-6.400 Denial Policy in General

The regulations neither create new privileges nor supersede discovery obligations that exist under the Federal Rules of Civil Procedure. 28 C.F.R. 16.21(d). They merely serve as a procedural vehicle to allow the Department the opportunity to protect information from unwarranted and unconsidered disclosure. It is only in infrequent situations, after all possible alternatives have been exhausted, that the Deputy Attorney General or Associate Attorney General should be requested to issue a denial. Therefore, pursuant to 28 C.F.R. 16.24(d)(1), it is Departmental policy that all steps must be taken to limit the demand prior to referring the matter to the Deputy Attorney General for his/her decision. These steps include, most importantly, the filing of a motion to quash the demand. In addition, negotiations should also be undertaken with the person making the demand to limit its scope. *See* 28 C.F.R. 16.24(d)(1)(ii). Because each request for denial requires the personal review of the Deputy Attorney General or the Associate Attorney General, it is necessary to limit the number of such requests to those that are truly necessary; therefore, no memorandum requesting a denial should be submitted prior to the filing and denial of a motion to quash unless the filing of such motion is clearly inappropriate under the circumstances. 28 C.F.R. 16.24(d)(1)(iii).

Because the denial of a demand made by a court is an extraordinary act, denial authority is strictly limited, and no Department official below the level of the Deputy Attorney General or the Associate Attorney General may issue a denial under the regulations in any situation. 28 C.F.R. 16.25. Since there are cases in which the Attorney General may be personally involved, the regulations make it clear that his/her decision to authorize or deny disclosure in such cases is final. 28 C.F.R. 16.24(g).

1-6.420 Presence of Factors Set Forth in 28 C.F.R. Sec. 16.26(a), (b)

Subsection (a) of Section 16.26 identifies generally the areas of law that Department officials and attorneys should consider in deciding whether to make disclosures. Because the factors relevant to a particular demand vary widely with the nature of the demand, and to avoid any suggestion that, through this procedural regulation, the Department might be seeking to impose legal standards different from the ordinary rules of procedure and the substantive law concerning privilege, the regulation adopts a highly general approach in subsection (a), instead of attempting a detailed list of considerations.

The factors to be considered in whether to make a disclosure are twofold, and as noted, general in nature. First, the official making the decision is to consider whether the disclosure in question is appropriate under the rules of procedure governing the case or matter in which the demand arose. Second, he/she is to consider whether disclosure is appropriate under the relevant substantive law concerning privilege. These general factors are, of course, the same factors to be considered in filing the appropriate motions to quash. A failure on either ground—rules of procedure or substantive law of privilege—is one predicate for initiating the process leading to denial. At the initial stages, release cannot be authorized unless the official making the determination is assured, *inter alia*, that the demanded disclosure is appropriate under these general Section 16.26(a) factors. *See* 28 C.F.R. 16.24(b)(3).

Subsection (b) of Section 16.26 contains a number of very specific factors that set forth areas where disclosure should not be made. For a discussion of these factors, see the DOJ Organizations and Functions Manual at 25.

1-6.440 Decision by the Deputy Attorney General or the Associate Attorney General

The authority of the Deputy Attorney General or the Associate Attorney General to order disclosure despite the presence of one or more of these factors is delineated in Section 16.26(b). If any of the factors set forth in paragraphs 1 to 3 (violation of law, violation of specific regulation or disclosure of classified information) is present, the regulations state that neither official will authorize a disclosure. If any of the factors set forth in paragraphs 4 to 6 are present, the regulations state that disclosure will not be authorized unless either official determines that the administration of justice requires disclosure. Remember that under the regulations only these officials can order a denial. Of course, as head of the Department, the Attorney General also possesses the power to order a denial.

If a disclosure is to be ordered, despite the presence of a factor set forth in paragraphs 4-6, as being in the interest of the administration of justice because disclosure is deemed necessary to pursue a civil or criminal prosecution or affirmative relief, such as an injunction, the regulations direct that consideration be given to: (a) the seriousness of the violation or crime involved; (b) the past history or criminal record of the violator or accused; (c) the importance of the relief sought; (d) the importance of the legal issues presented; and (e) any other matters brought to the attention of the Deputy Attorney General or the Associate Attorney General.

Finally, in all cases that are referred to the Deputy Attorney General or the Associate Attorney General in which none of the factors set forth in paragraphs 1 to 6 are present, those officials are to authorize disclosure, unless, in their judgment, after considering the factors set forth in Section 16.26(a), disclosure is unwarranted. *See* 28 C.F.R. 16.26(c).

1-6.500 Procedure in the Event a Departmental Decision Has Not Been Made at the Time a Response is Required

It is the lack of authorization, rather than the issuance of a denial, that often precludes compliance with a demand at the proceeding. The subpoenaed official who has not received authorization by the date of the appearance must respectfully inform the court that he/she cannot comply. It is essential in cases in which the United States is not a party that the local United States Attorney provide representation. In cases in which the United States is a party, such representation by the attorney in charge of the case or matter is presumed.

28 C.F.R. 16.27 contains instructions on the procedures to be followed in this situation. The subpoenaed employee should provide the court with a copy of the applicable regulations and state that the demand has been referred for the prompt consideration of the appropriate Department official. In rare cases these measures may not satisfy the court; the United States Attorney should then cite *United States ex rel. Touhy v. Ragan*, 340 U.S. 462 (1951) in which the Supreme Court held that an employee may not be held in contempt for failing to produce the demanded information where appropriate authorization had not been given. 28 C.F.R. 16.27, .28.

1-6.520 Procedure in the Case of a Denial

In those cases in which either the Deputy Attorney General or the Associate Attorney General has issued a denial, the Department employee to whom the demand has been made should appear at the proceeding and respectfully decline to comply with the demand, citing the regulations and providing the court with a copy of the written denial determination if time has permitted one to be obtained. Here, too, it is essential that the United States Attorney in cases in which the United States is not a party provide representation for the Department employee. In cases in which the United States is a party, such representation by the Department attorney in charge of the case or matter is presumed. As with the preceding section, it may be necessary to cite the case of *United States ex rel. Touhy v. Ragan, id.* 28 C.F.R. 16.28.

1-6.530 Responding to a Contempt Citation for Failure to Respond to a Demand

As noted, it is essential that a United States Attorney or other Department attorney appear in court with the witness. In the event that the court orders the witness incarcerated for contempt, the Assistant United States Attorney should immediately petition for a writ of habeas corpus (28 U.S.C. 2254 if in state custody or 28 U.S.C. 2255 if in federal custody). If the employee is in state custody, an alternative to habeas corpus is removal of the matter to federal court pursuant to 28 U.S.C. 1442. It is expected that contempt citations will be extremely rare. Action by the United States Attorney or other Department attorney in such cases is expected to be quick and vigorous.

1-6.600 Special Drug Enforcement Authorization

The Drug Enforcement Administration receives unique treatment with respect to authorizing testimony under 28 C.F.R. 0.103(a), a section of the regulations unaffected by the 1980 amendment to 28 C.F.R. 16.21 et seq. Under Section 0.103(a), the Administrator of DEA may authorize the testimony of DEA officials in response to subpoenas issued by the prosecution in federal, state, or local criminal cases involving controlled substances. 28 C.F.R. 0.103(a)(3). In addition, the Administrator may release information obtained by DEA and DEA investigative reports to federal, state, and local prosecutors and to state licensing boards engaged in the institution and prosecution of cases before courts and licensing boards related to controlled substances. 28 C.F.R. 0.103(a)(2). Note that this section only authorizes release to the government side of the covered cases. Any other

production of information or testimony by DEA officials is covered by 28 C.F.R. 16.21 et seq. For illustrative examples, see the DOJ Organizations and Functions Manual at 26.

1-6.620 Reimbursement of Travel Expenses

A Department of Justice employee who is summoned to appear and testify, or who is assigned to present testimony or to identify official documents in connection with a judicial or agency proceeding, is entitled to travel expenses if authorized by the Department of Justice to appear. Expenses are paid in accordance with normal government travel provisions, 5 U.S.C. §§ 5701 to 5708, unless reimbursed by the court or by the party summoning the witness. *See* 5 U.S.C. Sec. 5751. The appropriate amount chargeable for travel expenses is detailed in 28 C.F.R. Sec. 21.1.

1-6.630 Official Leave

A Department of Justice employee is entitled to official leave, not chargeable to annual leave, when appearing in his/her official capacity on behalf of the United States or when he/she has been summoned to appear on behalf of another party. *See* 5 U.S.C. 6322. However, no provision is made for official leave for an employee who appears voluntarily as a witness for a private party.

1-6.640 Witness Fees

When an employee appears on behalf of the United States, he/she is not entitled to a witness fee. 5 U.S.C. Sec. 5537. If the witness appears in an official capacity for a party other than the United States, any witness fee received is deducted from his/her pay. *See* 5 U.S.C. Sec. 5515.